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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

TRANS-PACIFIC FREIGHT CONFERENCE
OF JAPAN/KOREA, *et al.*,

Petitioners,

v.

FEDERAL MARITIME COMMISSION and
THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Section 15 of the Shipping Act, 1916, as amended, 46 U.S.C. §814 (1976), provides that the Federal Maritime Commission:

> shall disapprove any [conference] agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it. . . .

The question presented is whether the Commission is authorized by Section 15 to promulgate general regulations prescribing in advance a detailed self-policing system which all conferences, foreign and domestic, must adopt, including, *inter alia*, a provision requiring every conference to make records of its policing activities available to the Commission—a power of compulsory disclosure that Congress had withheld from the Commission in order to avoid the risk of endangering the continued viability of the conference system and the friendly relations of the United States with other maritime nations.

REFERENCE TO PARTIES BELOW

The following conferences and rate agreements were parties to the proceedings below:

Trans-Pacific Freight Conference of Japan/Korea
Japan/Korea-Atlantic and Gulf Freight Conference
Japan-Puerto Rico & Virgin Islands Freight Conference
Far East Conference
Pacific Westbound Conference
Agreement No. 10107
Agreement No. 10108
New York Freight Bureau
Trans-Pacific Freight Conference (Hong Kong)
Philippines North America Conference

Atlantic & Gulf-Singapore, Malaya and Thailand Conference
Atlantic & Gulf Indonesia Conference
Pacific Indonesian Conference
Pacific Straits Conference
Thailand/U.S. Atlantic & Gulf Conference
Thailand-Pacific Freight Conference
Deli-New York Rate Agreement
Deli/Pacific Rate Agreement
Java/New York Rate Agreement
Java/Pacific Rate Agreement
India, Pakistan, Ceylon & Burma/West Coast United States Rate Agreement
Trans-Pacific American-Flag Berth Operators Agreement
West Coast United States & Canada/India, Pakistan, Ceylon & Burma Rate Agreement
Straits/New York Conference
Malaysia-Pacific Rate Agreement

The following were intervenors in the proceedings below:

Latin America/Pacific Coast Steamship Conference
Pacific Coast/River Plate, Brazil Conference
Pacific Coast/Australasian Tariff Bureau
Gulf-Mediterranean Ports Conference
Australia/Eastern U.S.A. Shipping Conference "8900" Lines
Iberian/U.S. North Atlantic Westbound Freight Conference
Marseilles North Atlantic U.S.A. Freight Conference
Med-Gulf Conference
Mediterranean-North Pacific Coast Freight Conference
New Zealand Rate Agreement
North Atlantic Mediterranean Freight Conference

South Atlantic/Spanish, Portuguese, Moroccan and Mediterranean Rate Agreement
Spanish Eastbound Freight Agreement
U.S. Atlantic & Gulf/Australia-New Zealand Conference
West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference

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OPINIONS BELOW

The opinion of the Court of Appeals, which is not yet reported, is reproduced as Petitioners' Appendix A ("Pet. App."), *infra*, pp. 1a-64a. The order of the Court of Appeals, entered on October 31, 1980, denying rehearing is reproduced as Petitioners' Appendix B, *infra*, p. 65a.

The orders of the Federal Maritime Commission are as follows:

(1) General Order 7, Docket 73-64, Notice of Proposed Rulemaking, October 17, 1973 (Pet. App. C, *infra*, pp. 69a-79a);

(2) General Order 7, Docket 73-64, Final Rule, April 18, 1978 (Pet. App. D, *infra*, pp. 80a-105a);

(3) General Order 7, Docket 73-64, Reconsideration and Modification of Final Rules, September 14, 1978 (Pet. App. E, *infra*, pp. 106a-134a);

(4) General Order 7, Docket 73-64, Affirmance of Final Rules, December 18, 1978.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on September 11, 1980. A petition for rehearing was denied on October 31, 1980. On January 23, 1981, Chief Justice Burger extended the time to file a petition for certiorari to February 9, 1981. (Pet. App. F, *infra*, p. 135a.) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE AND REGULATIONS INVOLVED

Section 15 of the Shipping Act, 1916, as amended, 46 U.S.C. §814 (1976), is reproduced as Petitioners' Appendix G, *infra*, pp. 136a-137a.

46 C.F.R. Part 528 is reproduced as Petitioners' Appendix H, *infra*, pp. 138a-145a.

STATEMENT OF THE CASE

Petitioners are international shipping conferences and rate agreements composed of both domestic and foreign carriers which operate between various United States and

foreign ports.[1] These voluntary associations set transportation rates and establish rules, regulations and self-policing mechanisms to provide dependable ocean carrier service at relatively stable rates. The agreements pursuant to which petitioners operate are approved by the Federal Maritime Commission under Section 15 of the Shipping Act, 1916, as amended, 46 U.S.C. §814, and are thereby exempted from the antitrust laws of the United States.

Under Section 15 of the Shipping Act, as amended in 1961, the Commission is authorized to disapprove a conference agreement "after notice and hearing, on a finding of inadequate policing of the obligations under it. . . ." In 1967, the Commission promulgated general regulations under Section 15 requiring conference agreements to contain a description of the method used to police the agreement and requiring conferences to submit semi-annual reports to the Commission concerning their policing activities. 46 C.F.R. §528 (1967 Supp.). These regulations were upheld in *Outward Continental North Pacific Freight Conference v. Federal Maritime Commission*, 385 F.2d 981 (D.C. Cir. 1967).

The Commission has never instituted a proceeding to disapprove an agreement based on a conference's failure to adequately police its obligations.

In October 1973, the Commission issued a notice of proposed rulemaking, spelling out in precise detail a uniform, mandatory system of self-policing requirements applicable to all conferences and other rate-fixing agreements between shipping carriers in foreign and domestic commerce. Section 528.2 of the proposed rules required

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[1] Petitioners' members are set forth as Petitioners' Appendix I, *infra*, pp. 146a-152a.

every self-policing system to engage an outside agency to "constantly police" the activities of the conference's members through inspection of books and records, "surprise audits" and other specified measures, including requiring conference members and their associates to produce their records, wherever located, to the outside agency. This section also required every self-policing system to provide, upon request, a copy of all records of self-policing activities to the Commission or any other appropriate governmental body, but that the names of the parties involved could be deleted. However, Section 528.4 provided for coded identification of all parties to self-policing investigations.

Numerous groups, including petitioners, filed comments opposing the proposed rules. The Commission's Bureau of Hearing Counsel urged that the provision requiring production of records of self-policing activities be deleted because it could not be enforced against conferences headquartered outside the United States. The Bureau noted that a similar provision had been deleted from the 1961 amendments to the Shipping Act.[2]

The Commission did not act on the proposed rules until April 1978, when it issued a so-called "Final Rule" eliminating altogether the requirement of furnishing records of self-policing activities to the Commission. However, the provision requiring conferences and rate agreements to establish an outside policing agency was retained.

Again, numerous petitions for reconsideration of the "Final Rule" were filed by conferences and rate agreements. On September 14, 1978, the Commission issued a "Reconsideration and Modification of Final Rules" revis-

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[2]JA below at 183.

ing the April rules in several significant respects. Although the requirement for an outside policing body was retained, the final version of the rules harked back to the 1973 proposal by requiring conferences to delete from their agreements all confidentiality provisions protecting members from orders by the Commission for production of self-policing information and data. The policy statement accompanying the rules announced a new Commission intention to use the self-policing data in collateral enforcement of the Shipping Act. The rules also substantially increased the record-keeping obligations of the policing bodies. On December 18, 1978, the Commission denied requests for reconsideration and issued its "Affirmance of Final Rules."[3]

On appeal pursuant to 28 U.S.C. §2342, petitioners contended that the rules were unauthorized by Section 15 of the Shipping Act and were promulgated in violation of the Administrative Procedure Act, 5 U.S.C. §§551-706. On September 11, 1980, with Judge Markey dissenting, the Court of Appeals upheld the regulations.[4]

REASONS FOR GRANTING THE WRIT

As Judge Markey stated in his dissent, the important question presented by this case is whether, in issuing the general rules imposing self-policing requirements upon

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[3]On October 15, 1978, a dissenting opinion was filed by Commissioner Karl E. Bakke. JA below at 780-806.

[4]In a separate proceeding to enforce the self-policing rules, the Commission entered an order on October 17, 1979, dissolving nine conferences on the ground that their conference agreements did not contain the self-policing provisions required by the rules. An appeal from that order is now pending. *Deli/New York Rate Agreement v. Federal Maritime Commission*, No. 79-2332 (D.C. Cir. 1979).

foreign and domestic carriers, the Commission acted "directly contrary to congressional limitations on its authority." (Pet. App. A, *infra*, p. 50a.) The resolution of this question is of great importance to the international shipping community, and affects not only the continued viability of the conference system but also the relations of the United States with friendly maritime nations.

In Section 15 of the Shipping Act, 1916, Congress conditioned the continued legality of conference agreements upon adequate *self*-policing, not upon policing by the Federal Maritime Commission. The selection of a self-policing system—in which the Commission's oversight role was expressly limited to its disapproval of a conference agreement in individual cases "after notice and hearing, on a finding of inadequate policing of the obligations under it"—was deliberate. Congress was acutely aware when it enacted Section 15 that excessive governmental regulation would be regarded by foreign carriers and nations as an unwarranted interference in their internal affairs. The Commission's self-policing requirements represent an end-run around the statute, an exercise of regulatory powers withheld by Congress for fear of jeopardizing the conference system.

The rules impose sweeping, mandatory obligations on multinational shipping conferences, including disclosure of sensitive self-policing documents, that would eliminate the flexibility and the confidentiality that are at the heart of the conferences' self-policing systems. By assuming regulatory powers deliberately withheld by Congress, the Commission's actions threaten to destroy the conference system altogether by precipitating the withdrawal of

foreign carriers opposed to unauthorized intrusion of the Commission into the self-policing process.[5]

1. Congress Recognized that Excessive Unilateral Regulation of Foreign Carriers by the United States Risks Destruction of the Conference System and Endangers Friendly Foreign Relations.

Congress approved the conference system because it believed that the "competitive rigors" of ocean shipping, if unleashed, "almost invariably . . . destroy the requisite dependability, regularity and nondiscriminatory nature of ocean common carriage." S. Rep. No. 860, 87th Cong., 1st Sess., *reprinted in* [1961] U.S. Code Cong. & Ad. News 3108, 3110-11. Accordingly, in the Shipping Act of 1916, Congress immunized the conferences from the antitrust laws in exchange for the stable service, uniform rates and protection of economically weaker American-flag lines that the conferences provide.

However, Congress has consistently recognized that the fragile, multinational character of shipping conferences imposes a limit on the power of one government to dictate conference obligations. Foreign carriers and foreign governments, whose cooperation is essential to the conference system, have repeatedly resisted attempts by

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[5] Following meetings held in Tokyo during the week of January 19, 1981, five members of petitioner Philippines North America Conference, being unwilling to comply with the regulations, submitted their resignations from the Conference. This, in turn, has had a spiraling effect, prompting the resignations of two other Conference members. Also because of the regulations, there have been resignations by members of petitioners Straits/New York Conference and Atlantic & Gulf Indonesia Conference.

the United States to interfere in the policing of conference agreements and, in particular, to compel disclosure of sensitive documents maintained by shipping lines and their associates.[6] The provisions of the Shipping Act have been shaped by Congress's perception of the need to balance, on the one hand, the interest in maximum effective enforcement of conference obligations and, on the other, the concern of conference members to protect confidential internal records from the reach of a foreign government.

Nowhere was this need for a delicate accommodation of competing interests more recognized by Congress than in the 1961 amendments to the Shipping Act. While concerned with sanctioning conference agreements providing for dual rates found illegal in *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481 (1958), Congress also amended Section 15 to define and limit the authority of the Commission to oversee self-policing systems. The Senate Report accompanying the final bill warned of the "major deleterious effects and negligible counterbalancing benefits" that would accompany "further unilateral attempts by this Government to regulate the details of commercial transactions of shippers and carriers which take place and are documented abroad . . . ." S. Rep. No. 860, 87th Cong., 1st Sess.,

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[6] "Associates" of conference members are defined by Section 528.1(a) of the rules to include all "persons, firms, associations, or corporations that are agents, employees or affiliates of members, or are otherwise subject to the control of a member, or which themselves control a member, or are commonly controlled by any person, firm, association or corporation which controls a member. . . ." A number of American members are owned by conglomerates, such as LTV and R.J. Reynolds Industries, whose records are therefore subject to the sweep of the regulations.

reprinted in [1961] U.S. Code Cong. & Ad. News at 3110. Such efforts, the Report noted:

> are likely to create further resentment among our foreign friends and, as a consequence, to cause reactions ranging from passive loss of confidence to active retaliation in foreign ports. In the process, they might well force foreign lines out of conferences, thereby destroying conferences and placing the high-cost American operator, even if subsidized, at a serious if not impossible competitive disadvantage.

Id. The Report also emphasized that, to the extent such extraterritorial regulation could not be as effectively enforced against foreign flag lines as against their American competitors, "we would be working at serious cross-purposes with fundamental precepts of national maritime policy." *Id.*

Congress's preference for self-policing was therefore dictated by the potentially destructive effect of unilateral governmental regulation of this cooperative, multinational system. In order to ensure the well-being of the system, with its large benefits to American shipping, Congress opted for less than all-out Commission regulation. It provided the Commission with enforcement powers that were explicitly limited and more narrow than those the agency had sought.

2. Congress Withheld From the Commission the Regulatory Powers at Issue Here.

Congress deliberately decided not to authorize the Commission to prescribe in advance the details of conference self-policing or to have access to the records and documents of conferences' self-policing bodies. The

language and legislative history of Section 15 leave no doubt that Congress withheld these powers from the Commission because it feared the damage that would be done to the conference system.

a. Section 15 of the Shipping Act

Section 15 provides, in pertinent part, that

> The Commission shall disapprove any [conference] agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it . . . .

As Judge Markey noted in dissent, Section 15 does not authorize the Commission "to prescribe in advance the precise kind of policing system all must adopt and the specific, detailed manner of operating that prescribed system." (Pet. App. A, *infra*, p. 52a.) On the contrary, the language reflects the allocation of authority made by Congress, namely that responsiblity for policing a conference agreement rests with each conference and responsiblity for determining whether obligations under the agreement have been adequately policed rests with the Commission.

The challenged regulations cross over the line drawn by Congress and violate the concept of conference self-policing. Even if a conference is *in fact* adequately policing its members, that fact is irrelevant under the regulations if the conference agreement does not contain each and every one of the numerous requirements specified by the Commission. These obligations take no account of the different size, stability or trade volume of the various conferences and deprive them of the flexibility Congress intended them to have in tailoring their self-policing systems to their individual needs.[7]

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[7]Section 528.3(b)(3) authorizes the Commission to exempt a conference only from the requirement of establishing an outside

[footnote continued]

The document disclosure provision of the Commission's regulations does particular violence to the self-policing scheme envisioned by Congress. In addition to requiring that all records—wherever located—be turned over to the outside agency, the rules prohibit a conference agreement from (1) denying access to such records, reports or other information in contravention of a Commission order or (2) precluding conference members from disclosing the nature and extent of their involvement with the self-policing authority. 46 C.F.R. §§528.2(c)(1)(iii), 528.1(c).

Congress and the courts have previously recognized that multinational shipping conferences regulating ocean-going freight rates and service depend for their continued existence upon a system of confidential self-policing of conference obligations. Because of the intense competition for business, a steamship company is usually reluctant to let it become known that it has complained about an illegal arrangement entered into by a competitor with a shipper, for fear of losing the latter's business. As the court noted in *States Marine Lines, Inc. v. Federal Maritime Commission*, 376 F.2d 230, 238 (D.C. Cir. 1967):

> The Commission and the Conferences maintain that secrecy is critical to the success of the policing system. . . . [W]e accept the Commission's finding that the system cannot operate otherwise.[8]

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policing agency. However, the exemption provision states that petitions for exemption will not be "lightly granted," and the right to an exemption is so circumscribed with vague and subjective conditions that it is virtually impossible to determine whether any conference could secure an exemption. To date, no exemption has been granted. The Commission has, moreover, adopted a statement of policy requiring all conferences which have filed for an exemption to comply with the neutral body requirement "unless and until" the exemption is granted.

[8]The court also emphasized in *States Marine* that Section 15 does not authorize the Commission to become involved

[footnote continued]

The majority opinion below recognized that compelling self-policing entities to disclose their records to the Commission "clearly would run contrary to the legislative history of the 1961 amendments [to the Shipping Act]." (Pet. App. A, *infra*, p. 38a.) Curiously, however, the majority held that, because the rule does not by its terms *affirmatively* require disclosure of documents and records but only prohibits a self-policing entity from "deny[ing] access . . . in contravention of a duly issued order of the Federal Maritime Commission," there was no flouting of Congress's rejection of compelled disclosure.

Obviously, the substance of the Commission's rule is the same, whether phrased in the affirmative or double negative. Prohibiting denial of access is the equivalent of compelling grant of access. As Judge Markey stated, negative phrasing does not change the essential "confidentiality-destroying effect" of the rule. (Pet. App. A, *infra*, p. 53a.)

The majority's dismissal of petitioners' challenge to this rule as "premature" also ignores the Commission's expressed purpose to use documents compiled by self-policing bodies for collateral enforcement of the Shipping

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> [I]n the task of examining all the evidence presented to the Neutral Body. . . . This, of course, is not the responsibility assigned the Commission by Section 15. Section 15 authorizes the Commission to "disapprove, cancel or modify any agreement," not to sit in judgment of the day-to-day operations carried out under that agreement. Moreover, to place the Commission in the role of an on-going appellate panel, intimately involving it in a case-by-case review of the Conferences' Neutral Body system, would hardly be consistent with Congress' intent that the Conferences engage in *self*-regulation.

376 F.2d at 242 (emphasis in original).

Act. The Commission stated that it intends to assess an additional penalty on a wrongdoer already subjected to an enforcement action by a conference. This use of conferences' policing records to support imposition of additional, independent penalties by the Commission is totally at odds with the division of enforcement responsibility between conferences and the Commission provided by Section 15. As Judge Markey noted in dissent, the Commission's use of a conference's self-policing actions as a basis for further penalties "creates a classic 'catch-22,' in which a conference is doomed by its successes." (Pet. App. A, *infra*, p. 55a.)[9]

Foreign steamship companies and their governments have objected to excessive regulation by the United States of the international shipping industry. As detailed below, foreign maritime nations have stated in the strongest terms that they would rather see the conferences dissolve than permit their nationals to comply with requests for production from the Commission. The intended use of internal documents to impose additional penalties on conference members will surely hasten this process of withdrawal. With non-conference competitors subject to no policing requirements, the prospect of dual policing and dual penalties places too high a price on conference membership.

The majority mistakenly characterizes petitioners' claim as a denial of the Commission's power to proceed

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[9]In his dissent from the final rules, Commissioner Bakke noted that he was "appalled" by the system of dual penalties outlined by the Commission. (JA below at 785.) He questioned whether the continued cooperation of foreign carriers could be expected in the event the conferences' self-policing body became a "conduit" through which information was supplied to the Commission for collateral enforcement purposes. (*Id.* at 787.)

by rulemaking. (Pet. App. A, *infra*, p. 15a.) Petitioners do not contend that under Section 43 of the Shipping Act, 46 U.S.C. §841a, the Commission is not authorized to promulgate regulations necessary to carry out the provisions of the Act.[10] However, it is axiomatic that a general grant of rulemaking authority to an agency cannot be exercised to achieve a result contrary to the clearly expressed intent of Congress. *Blair v. Freeman*, 370 F.2d 229, 235 (D.C. Cir. 1966); Davis, *Administrative Law Text* §6.04, at 145 (3d ed. 1972).

b. Legislative History of Section 15

In enacting the 1961 amendments to the Shipping Act, Congress considered and rejected granting the Commission the specific policing powers that it now seeks to exercise. Testimony and comments submitted to Congress at the time convinced it that Commission authority to prescribe, in advance, general policing standards for all conference agreements and to have access to documents and records of self-policing agencies presented too great a threat to the continued operation of the conferences.

i. Authority to Set Policing Standards

Two separate proposals which would have authorized the Federal Maritime Board, the Commission's predecessor, to determine the self-policing requirements of a conference agreement, prior to implementation, were

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[10]The regulations governing self-policing agreements which were promulgated in 1967 and upheld in *Outward Continental North Pacific Freight Conference v. Federal Maritime Commission*, 385 F.2d 981 (D.C. Cir. 1967) (*per curiam*), require only that each conference agreement contain a description of its self-policing mechanism and that each conference submit semi-annual reports describing self-policing activities. The court characterized the nexus between even these limited regulations and Section 15 as "attenuated." *Id.* at 984.

considered and rejected by Congress. The version of Section 15 contained in the House bill provided that:

> No conference agreement shall be approved unless the Board finds that it contains *effective* provisions for policing the obligations under it. The Board shall disapprove any such agreement, after reasonable notice, on a finding of inadequate policing of the obligations under it.[11]

This provision, which would have authorized the Commission to do what it has done here, *i.e.*, to scrutinize in advance the effectiveness of conference agreement self-policing provisions, was rejected by the Senate Merchant Marine and Fisheries Subcommittee. In hearings held before that Subcommittee, a spokesman for the American carrier industry objected strongly to the House-passed provisions:

> Mr. Wierda: We would like to suggest that that sentence be completely deleted from the bill and the remainder stay in there, which says that the Board then shall disapprove any agreement if it finds, after some experience and after reasonable notice, that it does not actually police the obligations under it. We think that is more reasonable and more practical.
>
> Senator Engle (presiding): I agree with you.
>
> * * * * *
>
> I think it would be a mistake to try to tell the Federal agency that they are going to regulate this, because they are not going to regulate it . . .[12]

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[11] H.R. 4299 (Draft Revision No. 2), 87th Cong., 1st Sess., published on April 13, 1961 (emphasis added).

[12] Hearings on H.R. 6775 before the Merchant Marine and Fisheries Subcommittee of the Senate Committee on Commerce, 87th

[footnote continued]

Immediately following the hearings, a Subcommittee Print of the bill was released which deleted the House provision authorizing the Board to scrutinize agreements for "effective provisions." In its place, the Senate bill authorized the Board to "prescribe general standards of organization and procedure with respect to conference policing and enforcing devices and agencies. . . ."[13] Thus, this substitute measure, too, would have given the Board the power to prescribe general policing standards.

However, the Senate Subcommittee received extensive testimony from foreign government and industry witnesses criticizing the provisions as an impediment to the process of self-regulation. The British government expressed the common concern, stating that the proposals relating to policing and enforcing were:

> inconsistent with the principle, which H.M. Government support, that conferences should themselves be responsible for policing and enforcing their agreements and that it is inappropriate for the agency of a single Government unilaterally to prescribe standards of organization and procedure for the control of international shipping services in which other countries have an equal concern.[14]

Cong., 1st Sess. (Parts 1 and 2), p. 533. As Judge Markey pointed out in dissent, there is not the slightest evidence in this colloquy or elsewhere in the legislative history to support the majority's view that Congress's objection to Commission intrusion in conference self-policing was only temporary and would be removed once the Commission gained experience with the conference system. (Pet. App. A, *infra*, p. 57a n.9.)

[13] *Id.* at 698.

[14] *Id.* at 631. Numerous spokesmen emphasized the practical problems of prescribing uniform rules to meet the varying needs of different conferences. A spokesman for a Far Eastern conference

[footnote continued]

The final bill reported by the Senate deleted both of the controversial provisions. The Senate Report accompanying the bill stated:

> *We also deleted a provision which would have amended section 15 to require that no conference agreement could be approved unless the Commission found that the agreement contained "effective" provisions for policing the obligations under it.* Your committee's amendment would require the Commission to disapprove any conference agreement if it found, after notice and hearing, that as among the members there had been inadequate policing and enforcing of their obligations under the agreement.

S. Rep. No. 860, 87th Cong., 1st Sess., *reprinted in* [1961] U.S. Code Cong. & Ad. News at 3124 (emphasis added). As the Court of Appeals pointedly noted in *Outward Continental North Pacific Freight Conference v. Federal Maritime Commission*, 385 F.2d 981, 984 n.7 (D.C. Cir. 1967), Congress thus eliminated the provision

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warned that the House and Senate proposals presented "the same danger that the Board, in order to avoid speculation, will promulgate standards for policing arrangements which will be completely unsuited for some trades, and much too ponderous and expensive for others." *Id.* The North Atlantic conferences agreed that:

> there can be no general advance standards of organization applicable to all situations and all times. The real test is whether or not there are adequate policing and enforcing devices—that is, whether they work. We agree that the Board is entitled to determine this and to act accordingly. We do not agree that it can set up any general standards which would be universally satisfactory.

Id. at 685-86. To similar effect was testimony submitted by Trans-Atlantic, Danish, Norwegian, and Dutch shipowners and conferences.

authorizing the Commission to require that "effective" provisions be included *before* an agreement could be approved. The Commission is therefore now claiming an authority that Congress deliberately withheld from it.

ii. Commission Access to Policing Documents and Records

As the majority of the Court of Appeals acknowledged, Congress explicitly decided against giving the Commission power to compel production of records and documents of self-policing activities in Section 15 of the Act. (Pet. App. A, *infra*, pp. 35a-36a.) A proposal to include such a provision in the 1961 amendments raised such a "storm of protests"[15] that Congress quickly decided that implementation of such a plan could shatter the conference system.

Section 15 of the House Bill provided that no agreement was to be approved by the Commission unless it (1) designated a person upon whom service of process could be made in the United States, which would be effective against every signatory to the agreement, and (2) provided that every signatory would make available records or other information required by order of the Commission. This proposal and a similar proposed amendment to Section 21 of the Act, 46 U.S.C. §820, met with virtually uniform opposition during hearings before a Subcommittee of the Senate Commerce Committee.

The State Department urged the Committee to delete the provisions "because of their irreparably damaging effect upon important considerations of foreign policy."[16] A dozen friendly maritime nations filed

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[15]S. Rep. No. 860, 87th Cong., 1st Sess., *reprinted in* [1961] U.S. Code Cong. & Ad. News at 3131.

[16]*Id.* During the hearings, the Honorable George W. Ball, then Under-Secretary of State for Economic Affairs, warned that, while

[footnote continued]

protests.[17] Every American and foreign-flag conference line urged their deletion.[18] Only the Federal Maritime Board favored the provisions. As the Senate Committee Report commented:

> Apparently the regulatory agency feels that so long as it is required to enforce the Shipping Act here and abroad with no distinction between those transactions which are in our import commerce and those which are in our export commerce, it must be given service-of-process powers and document-production powers similar to that contained in the House bill. Your committee believes, however, that "saying" the Commission has such powers, which obviously it cannot enforce effectively against the nationals of unwilling foreign governments, would result only in such provisions being enforceable effectively against American-flag lines, thereby prejudicing them in relation to their relatively unreachable foreign-flag competitors.[19]

To avoid this threatened prejudice and to avoid dissolution of the conferences themselves, Congress

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foreign governments would ordinarily support a system of *self*-regulation:

> If U.S. control of the [policing] agency caused it to become an extension of the U.S. Government activity, the agency might be regarded as an organ of the U.S. Government.

Under these circumstances, he reported, several governments would be prepared to prevent their nationals from cooperating with the agency. Hearings on H.R. 6775 before the Senate Merchant Marine and Fisheries Subcommittee of the Senate Committee on Commerce (Parts 1 and 2), 87th Cong., 1st Sess., at 586.

[17] S. Rep. No. 860, 87th Cong. 1st Sess., *reprinted in* [1961] U.S. Code Cong. & Ad. News at 3131.

[18] *Id.*

[19] *Id.*

struck these provisions from the final bill. The Senate Committee Report explains:

> Your committee deleted from the bill a provision which would have amended section 15, Shipping Act, 1916, to require that all agreements approved under that section . . . provide that every such signatory [to the agreement] shall furnish the Commission "records or other information," wherever located in compliance with Commission orders. This provision was so vigorously opposed, and for good reasons, by practically all interested parties except the Federal Maritime Board that we deleted it.[20]

The assertion of national jurisdiction has long been held suspect where it involves the delicate area of foreign relations and widely differing views of foreign governments as to the proper scope of unilateral regulation. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398

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[20] *Id.* at 3124. The Senate Committee also rejected a compromise version contained in a Subcommittee Print, dated August 8, 1961, that would have empowered the Commission, in its discretion, to obtain self-policing records and documents. H.R. 6775 (Subcommittee Print), 87th Cong., 1st Sess.

The majority opinion below found a contradiction between petitioners' argument that the Commission is barred under Section 15 from compelling disclosure of records and the "fact" that two decisions had interpreted Section 21 of the Shipping Act to allow the Commission to compel ocean carriers subject to the Act to produce documents located outside the United States. *See Montship Lines, Ltd. v. Federal Maritime Board*, 295 F.2d 147 (D.C. Cir. 1961); *Kerr Steamship Co. v. United States*, 284 F.2d 61 (2d Cir. 1960), *vacated per curiam on other grounds*, 369 U.S. 422 (1962). However, as the Senate Report to the 1961 amendments recognized, the two opinions addressed only the question whether the Board orders had been lawfully issued, not whether they could be enforced. S. Rep. No. 860, 87th Cong., 1st Sess., *reprinted in* [1961] U.S. Code Cong. & Ad. News at 3132. The Report concluded that there were strong reasons why the power to compel production of conference records should be deleted from the bill.

[footnote continued]

(1964). In an Aide-Memoire of June 17, 1979,[21] eight foreign governments protested the regulations. In November 1979, the governments of the United States and the Consultative Shipping Group ("CSG")[22] held meetings in Washington, D.C. at which deep concern was again expressed, whereupon the CSG governments were prompted to formulate their position on the record. By date of November 2, 1979, there was incorporated in Item 7(b) of the Agreed Record this notation:

> In relation to General Order 7 (FMC self-policing rules) the CSG side stressed the importance of genuine conference self-regulation. In the CSG's view, too close a U.S. involvement in these rules would not only create jurisdictional problems, but would also discourage carrier cooperation with self-policing machinery, thus frustrating the U.S. and CSG's shared goal of eliminating conference malpractices.[23]

Reciting instances of malpractice, the majority below mistakenly assumed that the Commission could regulate

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> Certainly, we would only muddy the waters and do violence to our foreign policy were we to leave such provisions in the bill. Furthermore, we are convinced that if we did so a number of steamship conferences would have to dissolve since a number of foreign lines would be compelled by their governments to withdraw, rather than submit to the receipt-of-process and document-production pledge required by the language of the bill.

Id.

[21]Petitioners' Appendix J, *infra*, pp. 153a-154a.

[22]The following governments are members of the Consultative Shipping Group: Belgium, Denmark, the Federal Republic of Germany, Finland, France, Greece, Italy, Japan, the Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom.

[23]Agreed Record of Consultative Shipping Group, November 2, 1979.

such abuses only by imposing these new requirements on the conferences. But carrier abuses are subject to other corrective action by the Commission which, unlike the rules here, take into consideration the operation of the conference system and the foreign policy interests of the United States.[24] Moreover, since the Commission was created in 1961, it has not once instituted a proceeding to disapprove an agreement based on a conference's failure to police adequately the obligations under it.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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[23]For example, Congress only recently prohibited the imposition of sanctions against carriers absent diplomatic consultations by the Secretary of State and Presidential review. Shipping Act Amendments of 1979, 46 U.S.C. §821(c)(3) & (4).